

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION

)
) MDL No. 1456
)

) Civil Action No. 01-CV-12257 PBS
)

THIS DOCUMENT RELATES TO
01-CV-12257-PBS AND 01-CV-339

) Judge Patti B. Saris
) Chief Magistrate Judge Marianne B. Bowler
)

**THE BMS DEFENDANTS' MEMORANDUM CONCERNING
SUBSEQUENT HISTORY OF CASE CITED BY PLAINTIFFS IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Dated: May 26, 2006

In their reply memorandum in support of their motion for partial summary judgment against BMS, plaintiffs cite Matter of Regina Corp., 61 F.T.C. 983, 1962 F.T.C. Lexis 92, at *34-36 (Oct. 11, 1962) for the proposition that list prices must be “the usual and customary prices at which products are sold.” (Pltfs.’ Reply at 3.) Without conceding that this case is relevant, BMS believes the Court should be aware that the FTC subsequently modified that decision in 65 F.T.C. 246 (1964), and adopted a regulation providing that a list price “will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made” 16 C.F.R. § 233.3.

Dated: Boston, Massachusetts
May 26, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James S. Zucker, hereby certify that on May 26, 2006, pursuant to Paragraph 11 of Case Management Order No. 2, I have caused to be served on all counsel of record a true and correct copy of the foregoing BMS Defendants' Memorandum Concerning Subsequent History of Case Cited by Plaintiffs in Support of their Motion for Summary Judgment by electronic service, by sending a copy of same to Lexis/Nexis File and Serve for posting and notification to all parties.

/s/ James S. Zucker
James S. Zucker